

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALLSTATE INSURANCE COMPANY, *et al.*,
Plaintiffs,
vs.
OBTEEN N. NASSIRI, D.C, *et al.*,
Defendants.

Case No. 2:08-cv-00369-JCM-GWF

ORDER

**Motion to Strike Aaron Patterson
- #322**

This matter is before the Court on Defendants Albert Noorda, M.D. and Maryland Medical Center's ("Noorda Defendants") Motion to Strike Aaron Patterson As An Expert Witness and Preclude His Opinions on Damages At Trial (#322), filed on May 31, 2011; Plaintiffs' Response to the Motion to Strike (#333), filed on June 16, 2011; and the Noorda Defendants' Reply to Plaintiffs' Response to the Motion to Strike (#335), filed on June 27, 2011. The Nassiri Co-Defendants filed a Joinder to the Noorda Defendants' Motion to Strike (#325) on June 6, 2011. The Court conducted a hearing in this matter on July 5, 2011.

FACTUAL BACKGROUND

Plaintiffs Allstate Insurance Company, Allstate Property & Casualty Company and Allstate Indemnity Company ("Allstate") allege that the Defendants provided unreasonable, unnecessary and/or fraudulent chiropractic or medical treatment to numerous patients/claimants who were injured in automobile accidents with Allstate insureds. Allstate alleges that it paid inflated settlement payments because of Defendants' improper chiropractic and medical services and billings. *Complaint* (#1), ¶¶ 19-114. Allstate seeks to recover the amount that it paid on each claim that was in excess of what the reasonable value of the claim would have been, but for

1 Defendants' wrongful conduct. Allstate has limited its damages claims in this case to 157
2 underlying bodily injury claims. All of the claimants received chiropractic treatment from the
3 Nassiri Defendants. Forty-five (45) of the claimants also received diagnostic or other medical
4 services from the Noorda Defendants, generally upon referral from the Nassiri Defendants.

5 Allstate retained Craig S. Little, D.C., a chiropractic physician, to review the claimants'
6 chiropractic and medical treatment records and bills and to provide expert opinions whether the
7 treatment and charges were reasonable and necessary. Dr. Little provided his report to Allstate on
8 August 13, 2010. As part of his report, Dr. Little prepared a chart which listed the total chiropractic
9 or medical expenses for each claimant together with the substantially lower amounts that Dr. Little
10 believes were reasonable. Allstate stated in its February 14, 2011 Disclosure of Expert Witness
11 Testimony ("Expert Witness Disclosure") that Dr. Little is expected to testify consistent with his
12 reports that chiropractic and medical treatment records revealed a pattern of misleading clinical
13 information, grossly exaggerated clinical findings, reports of diagnoses that were not supported
14 within reasonable medical probability, modes of care that were [not] supported as medically
15 necessary, clearly excessive chiropractic treatment, unreasonable charges for chiropractic treatment
16 that included gross misrepresentation in billing for actual services, and inappropriate referrals for
17 diagnostic imaging and consultive evaluation. *See Motion to Strike (#322), Exhibit E, pp. 2-3.*

18 Allstate relies on Dr. Little's opinions as the foundation for determining what the
19 reasonable settlement value of the claims should have been. The reasonable value of a bodily
20 injury claim, however, includes not only the amount of the claimant's reasonable and necessary
21 chiropractic and medical expenses, but also includes the value of the claimant's general damages
22 for pain and suffering, as well as special damages for lost income, if applicable. According to its
23 May 11, 2011 supplemental interrogatory responses, Allstate has used two methods to determine
24 the reasonable settlement value of the claims. For any underlying claim that settled for less than
25 policy limits, Allstate states that Aaron Patterson used a formula that was created by Allstate to
26 determine the amount of overpayment:

27 Specifically, the amount of overpayment is the difference between 1)
28 the amount of the actual settlement and 2) the smaller amount that
Allstate should have paid. The amount that Allstate should have paid

1 was determined by calculating the ratio of the amount of the actual
2 settlement and the amount that Allstate had determined to be the
3 allowed expenses at the time the claim was initially settled, then
multiplying that ratio by the amount that Allstate's expert, Dr. Little,
opined was the amount of the reasonable expenses.

4 *Defendants' Motion (#322), Exhibit A, Plaintiffs' Second Supplementary Response to Defendant*
5 *Maryland Medical Center, LLC's First Set of Interrogatories* (served on May 11, 2011), p. 3.

6 For any underlying claim that settled for policy limits, Mr. Patterson personally reviewed
7 each claim to determine the amount that Allstate should have paid by evaluating: the amount of
8 reasonable, necessary chiropractic and medical expenses as determined by Dr. Little, the force and
9 nature of the collision, the fault for the collision, the extent of property damage, whether there was
10 any emergency care, whether there were any delays in treatment, the type of treatment received, the
11 claimants' responses to that treatment, the information that Allstate has learned in its investigation
12 since that time, the credibility and likeability of the witnesses and parties, and other factors that
13 pertain directly to the presentation of the claim to a jury. The amount that Allstate should have
14 paid is then subtracted from the amount of the actual settlement, and the result is the amount of
15 overpayment. Allstate explains that "[t]he reason that Allstate used this alternative approach for
16 cases that settled for policy limits is that when a case settles for policy limits the amount of the
17 settlement may not have been a true valuation of the case. It may simply have been all the money
18 that was available." *Id.*, pp. 3-4.

19 Mr. Patterson prepared a Damages Spreadsheet which sets forth in columns for each claim:
20 (1) the total expense allowed, (2) the settlement amount, (3) the applicable policy limits, (4) the
21 reasonable chiropractic expense per Dr. Little, (5) the reasonable referral and other reasonable costs
22 (which would include the charges by the Noorda Defendants), (6) the amount Allstate should have
23 paid, and (7) Allstate's damages, i.e. the difference between the settlement amount and the lower
24 amount Allstate believes it should have paid. *Motion (#322), Exhibit C.* According to this
25 Spreadsheet, the total overpayment for all 157 claims is \$1,378,107.38.

26 It appears from the Spreadsheet that 38 of the claims settled for policy limits and were
27 therefore evaluated by Mr. Patterson under the second method for determining the amount of
28 overpayment. Allstate's counsel represented at the hearing on this motion that neither Allstate nor

1 Mr. Patterson have any notes, memoranda or other documents besides the Spreadsheet pertaining to
2 how Mr. Patterson calculated or determined the alleged overpayments. Allstate has also not
3 provided any information regarding the creation of the formula for determining the actual value of
4 claims that settled for less than policy limits. It is not even clear whether Mr. Patterson created this
5 formula or what input, if any, he had in its creation.

6 The chronology of events relating to Allstate's damages computation and the opinions of its
7 damages witnesses are pertinent to the resolution of this motion. On August 15, 2010, the Nassiri
8 Defendants filed a motion to strike Allstate's damages claim based on its failure to provide a
9 damages computation as required by Fed.R.Civ.Pro. 26(a)(1)(A)(iii). *See Motion to Strike*
10 *Plaintiffs' Claim for Damages* (#211). Shortly after that motion was filed, Allstate disclosed Dr.
11 Little as its expert witness and provided his reports to the Defendants. In response to Defendants'
12 motion, Plaintiffs' counsel also prepared an estimated computation of Allstate's damages.¹ This, in
13 turn, led Defendants to file a motion to disqualify Allstate's counsel on the grounds that he would
14 now be a trial witness for Allstate regarding its calculation of damages. *See Motion to Disqualify*
15 *(#254)*, filed on November 29, 2010.

16 During the November 30, 2010 hearing on Defendants' Motion to Strike Plaintiffs' Claim
17 for Damages, Plaintiffs' counsel, Bruce Kelley, stated that Aaron Patterson, an employee of
18 Allstate, would testify at trial regarding the calculation of Plaintiffs' damages for overpayment of
19 the underlying claims. Although Allstate had previously disclosed Mr. Patterson as a witness, it
20 had not specifically identified him as Allstate's damages witness. Mr. Kelley stated that Mr.
21 Patterson's testimony would be independent of counsel's computation of Allstate's estimated
22 damages. Mr. Kelley also stated that Plaintiffs would revise their damages computation once they

24 ¹ On September 21, 2010, the Court granted the parties' Fourth Amended Stipulated
25 Discovery Plan and Scheduling Order (#243), which extended the deadline for disclosing expert
26 witnesses to February 16, 2011; extended the deadline for disclosing rebuttal experts to March 15,
27 2011, and extended the deadline for completing all discovery to April 15, 2011. Due to the parties'
28 inability to complete discovery prior to this deadline, the Court has since granted further extensions
of the discovery cutoff date. *See Order #299 and Minutes of Proceedings*, #289, #292, #304, and
#315.

1 had reviewed the complete patient files that had recently been produced by the Nassiri Defendants.
 2 *See Order (#259), December 16, 2010, pp. 3-4.* In its order denying the Defendants' motion to
 3 strike Plaintiffs' damage claims, the Court stated:

4 Plaintiffs must, however, act diligently to complete their expert
 5 analysis of the subject claims, provide their experts' reports and a
 6 final damages computation. If Plaintiffs fail to do so by the expert
 7 disclosure deadline, then a motion to preclude them from introducing
 damages evidence at trial will likely be granted. Plaintiffs should
 also be aware that the type of speculative damages computation
 provided by Plaintiffs' counsel on August 17, 2010 is not adequate.

8 *Order (#259), p. 8.*

9 On January 11, 2011, the Noorda Defendants filed a motion for an order authorizing them
 10 to take two full days, February 9 and 10, 2011, for the deposition of Allstate's person most
 11 knowledgeable ("PMK"). The Defendants' notice of deposition listed 58 topics on which they
 12 intended to depose Allstate's PMK. *Motion (#261), Exhibit 1.* The topics did not include
 13 Allstate's computation of its damages. The Court granted the Noorda Defendants' motion on
 14 February 7, 2011. *Minutes of Proceedings (#272).*

15 On January 24, 2011, Allstate served its Fourth Supplement to Plaintiffs' Initial Disclosures
 16 Pursuant to FRCP 26(a)(1). This disclosure stated that Mr. Patterson would testify "as to the
 17 calculation of Allstate's damages in this case." *Defendants' Emergency Motion to Strike Plaintiffs'*
 18 *Complaint (#312), Exhibit 7, p. 2.* The Fourth Supplement also listed numerous factors that are or
 19 may be considered in determining the value of a bodily injury claim. After listing these factors, the
 20 Fourth Supplement stated:

21 Although Plaintiffs cannot enumerate every specific fact that is
 22 looked upon in each and every claim identified, it is Plaintiffs' hope
 23 that the above list will be of assistance to the Defendants.
 24 Furthermore, Plaintiffs would be more than happy to address any
 further questions regarding this subject at the deposition of **Aaron**
Patterson, who is the Person Most Knowledgeable for
ALLSTATE as to this issue.

25 During the PMK deposition on February 9th and 10th, the Noorda Defendants' counsel
 26 questioned Mr. Patterson about the Spreadsheet. Defendants assert, however, that they did not have
 27 an opportunity to thoroughly examine Mr. Patterson about the damages computation. As of the
 28 dates of that deposition, the expert witness disclosure deadline had not expired (it expired on

1 February 16th) and Allstate had not formally designated Mr. Patterson as its expert witness on
2 damages. Nor had Allstate produced a report by Mr. Patterson, or, conversely, informed
3 Defendants that no report would be forthcoming.

4 In its Expert Witness Disclosure served on February 14, 2011, Allstate listed Aaron
5 Patterson under a heading entitled “Non-Retained Expert Witnesses.” The Expert Witness
6 Disclosure further stated:

7 Aaron Patterson is expected to testify as to the facts and
8 circumstances surrounding the subject litigation. He will testify as to
9 his general knowledge regarding the policies and procedures to be
10 used in investigation, handling, evaluation and settlement of claims
11 by ALLSTATE, and specifically the Special Investigations Unit
12 (“SIU”). Additionally, he will testify as to the training of
ALLSTATE personnel in the SIU regarding same. He will further
testify as to his general knowledge of the tools available to
ALLSTATE personnel in performing the above tasks as well as how
said tools are used. **In addition, he will also testify as to the
calculation and amount of ALLSTATE’S damages in this matter.**

13 Specially, with regard to the tools available to ALLSTATE
14 personnel to perform the above described tasks, Mr. Patterson will
15 testify as to the importance of medical records and the reliance that
16 ALLSTATE personnel are required to place on those records. He
will also testify as to how ALLSTATE’S duties to its insureds affect
the investigation, handling, evaluation and settlement of claims.

17 **Attached as Exhibit “E” is ALLSTATE’S “Damages**
18 **Spreadsheet”, which illustrates and summarizes ALLSTATE’S**
damages in this case. (Emphasis added)

19 *Motion to Strike (#322), Exhibit E, p. 3.*

20 On February 17, 2011 and March 30, 2011, Allstate served its Fifth and Sixth Supplements
21 to Plaintiffs’ Initial Disclosures Pursuant to FRCP 26(a)(1). *Motion to Strike (#322), Exhibits B*
22 *and F.* Under “Witnesses,” Allstate set forth the same information regarding Mr. Patterson that
23 was set forth in its February 14, 2011 Expert Witness Disclosure. *Id. p. 2.* The Fifth and Sixth
24 Supplements also set forth the same information contained in the Fourth Supplement regarding the
25 method that Mr. Patterson and Allstate used to determine the settlement value of the underlying
26 claims.

27 On April 15, 2011, the Noorda Defendants filed an Emergency Motion for Leave to Take
28 the Deposition of Aaron Patterson as Percipient Witness (#293). The Noorda Defendants argued

1 that while they had deposed Mr. Patterson in his capacity as Allstate's PMK on February 9 and 10,
2 2011, the PMK deposition topics did not include Allstate's calculation or computation of damages.
3 Defendants also argued that Allstate did not disclose Mr. Patterson as a witness on the issue of
4 damages until February 17, 2011 when it served its Fifth Supplement to Plaintiffs' Initial
5 Disclosures Pursuant to FRCP 26(a)(1). *Emergency Motion* (#293), pp. 3-4. As stated above,
6 however, Allstate had formally disclosed Mr. Patterson as a lay witness on damages on January 24,
7 2011. (He had also been "informally" disclosed as Allstate's damages witness during the
8 November 30, 2010 hearing). Allstate had also disclosed Mr. Patterson as a "non-retained expert
9 witness" on the issue of damages in its February 14, 2011 Expert Witness Disclosure.

10 Allstate opposed the Noorda Defendant's motion on the grounds that Defendants had
11 known for many months that Mr. Patterson was Allstate's witness on damages, that Allstate had
12 provided the Damages Spreadsheet to Defendants two weeks before the PMK deposition and that
13 the Noorda Defendants' counsel had, in fact, questioned Mr. Patterson about the Spreadsheet
14 during the PMK deposition. Although Allstate's counsel acknowledged that Defendants' counsel
15 did not fully explore Mr. Patterson's opinions about the damages calculation during the deposition,
16 he argued that it was Defendants' counsel's fault in failing to do so, and Defendants were not
17 entitled to another opportunity to depose Mr. Patterson on the damages issue. *See Plaintiffs'*
18 *Response to Emergency Motion* (#300).

19 During the April 27, 2011 hearing on the Noorda Defendants' emergency motion, the Court
20 stated that Mr. Patterson is an expert witness on the issue of damages rather than a "percipient
21 witness." Although there was discussion as to whether Allstate was required to provide a written
22 expert report prepared and signed by Mr. Patterson, there was no pending motion in this regard and
23 the Court did not decide that question. The Court, instead, decided that the Noorda Defendants
24 should be granted three (3) additional hours to question Mr. Patterson about the damages
25 computation so long as they agreed not to file a motion to disqualify Mr. Patterson based on
26 Allstate's alleged failure to comply with Rule 26(a)(2)(B). (I.e., the Court would not permit
27 Defendants to further depose Mr. Patterson and at the same time allow Defendants to move to
28 disqualify him for not providing a written report.) The Defendants subsequently decided not to

1 take Mr. Patterson's deposition and, instead, filed the instant motion to disqualify Mr. Patterson
 2 based on Allstate's failure to comply with Rule 26(a)(2)(B).

3 DISCUSSION

4 The primary question on this motion is whether Allstate's expert witness Aaron Patterson
 5 was required to provide a written report containing a complete statement of his opinions and the
 6 basis and reasons therefore in compliance with Rule 26(a)(2)(B) of the Federal Rules of Civil
 7 Procedure. The secondary question is what remedies, whether by sanctions or additional discovery,
 8 should the Court provide regarding to Mr. Patterson's expert testimony on damages.

9 Rule 26(a)(2)(A) requires a party to disclose to the other parties the identity of any witness
 10 it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. Rule
 11 26(a)(2)(B) further provides that unless otherwise stipulated or ordered by the court, "the disclosure
 12 must be accompanied by a written report—prepared and signed by the witness—if the witness is one
 13 retained or specially employed to provide expert testimony in the case or one whose duties as the
 14 party's employee regularly involve giving expert testimony." The report must contain a complete
 15 statement of all opinions the witness will express and the basis and reasons for them, the facts or
 16 data considered by the witness in forming them, and any exhibits that will be used to summarize
 17 and support them. In addition, information must be provided regarding the witness's qualifications,
 18 publications, previous cases in which the witness has testified as an expert witness, and the
 19 compensation to be paid to the expert for his or her study and testimony in the case.

20 Pursuant to the 2010 amendment to Rule 26(a)(2), which became effective on December 1,
 21 2010,² a new subsection (C) was added to the rule. It provides as follows:

22 (C) *Witnesses Who Do Not Provide a Written Report.* Unless
 23 otherwise stipulated or ordered by the court, if the witness is
 24 not required to provide a written report, this disclosure must
 25 state:

26 ² The 2010 amendment "is to be applied in all cases pending at the time of its enactment to
 27 the extent that doing so is 'just and practicable.'" *Meredith v. International Marine Underwriters*,
 28 2011 WL 1466436, at *7, (D.Md. April 18, 2011), citing 2010 U.S. Order 27 (C.O. 27). *See also*
Carrillo v. Lowe's HIW, Inc. 2011 WL 2580666 (S.D.Cal. June 29, 2011).

- (i) the subject matter on which the witness is expected to present evidence under Federal Rules of Evidence 702, 703 or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

The 2010 Advisory Committee Notes regarding Rule 26(a)(2)(C) state that “[t]his amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).” The Note further states:

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness, and also provide expert testimony under Evidence Rule 702, 703 or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 2(a)(2)(C).

Federal case law is divided on the question of whether an employee expert witness should be required to comply with Rule 26(a)(2)(B) where his testimony is based on facts or data he obtained and reviewed specifically for the purpose of testifying at trial, notwithstanding that the employee’s duties do not regularly involve giving expert testimony. The conflicting views are represented by the decisions in *Day v. Consolidated Rail Corp.*, 1996 WL 257654 (S.D.N.Y. 1996) (requiring an expert report) and *Navajo Nation v. Norris*, 189 F.R.D. 610 (E.D.Wash. 1999) (holding that no report is required under the plain language of the rule).

In *Day v. Consolidated Rail Corp.*, the defendant disclosed an employee expert witness who would testify about track inspection requirements. The defendant argued that witness was not required to provide a report pursuant to Rule 26(a)(2)(B) because his employment duties did not regularly involve giving expert testimony and he was not retained or specially employed to provide expert testimony in the case. The court stated that the principal difficulty with this argument was that it created a distinction seemingly at odds with the rule’s evident purpose of promoting full pre-trial disclosure of expert information and “would create a category of expert trial witnesses for whom no written disclosure is required—a result plainly not contemplated by the drafters of the current version of the rules and not justified by any articulable policy.” *Day*, at *2. The court

1 stated that in a case in which the witness is being called solely or principally to offer expert
 2 testimony there is little justification for construing the rules as excusing the report requirement.
 3 The court further stated that since the witness's employment duties did not normally involve
 4 giving expert testimony, "he may fairly be viewed as having been 'retained' or 'specially
 5 employed' for that purpose." *Id.* at *3.

6 In *Prieto v. Malgor*, 361 F.3d 1313 (11th Cir. 2004), the Eleventh Circuit agreed with *Day's*
 7 analysis. The plaintiff in *Prieto* sued police officers for the alleged use of excessive force during
 8 his arrest. At trial, the defense was permitted to call Officer Rodriguez to testify as an expert on
 9 police procedures and the use of force. The defendant had identified Rodriguez as a witness on the
 10 use of force, but had not expressly identified him as an expert witness or provided a report in
 11 compliance with Rule 26(a)(2)(B). The court held that the rule does not exclude or exempt from
 12 the report requirement employee witnesses called solely or principally to offer expert opinion
 13 testimony. The court further explained:

14 Rodriguez had no connection to the specific events underlying this
 15 case apart from his preparation for trial. He merely reviewed police
 16 reports and depositions provided by counsel and offered expert
 17 opinions on the level of force exhibited by [plaintiff] and the
 18 appropriateness of the officers' response. . . . In other words, he
 19 functioned exactly as an expert witness normally does, providing a
 20 technical evaluation of evidence he has reviewed in preparation for
 trial. Because he had no direct, personal knowledge of any of these
 facts, his role was simply not analogous to that of a treating
 physician, the example offered by the Advisory Committee of an
 employee exempt from the written report requirement.
 Fed.R.Civ.Proc. 26 advisory committee's note.

21 *Id.* 361 F.3d at 1318-19.

22 Several district court decisions, including some in the Ninth Circuit, agree with the position
 23 set forth in *Day* and *Prieto*. This interpretation has been referred to as the majority view. *See*
 24 *Hardin v. Wal-Mart Stores, Inc.*, 2010 WL 3341897, *4 (E.D.Cal. 2010); *Funai Elec. Co. v.*
 25 *Daewoo Elec. Corp.*, 2007 WL 108973 at *5 (N.D.Cal. 2007); *McCulloch v. Hartford Life and*
 26 *Acc. Ins. Co.*, 223 F.R.D. 26, 28 (D. Conn. 2004); *National Railway Passenger Corp. v. Railway*
 27 *Express, LLC*, 268 F.R.D. 211, 215 (D.Md. 2010); *Minn. Mining and Mfg. Co. v. Signtech USA,*
 28 *Ltd.*, 177 F.R.D. 459, 460 (D.Minn. 1998); *KW Plastics v. U.S. Can Co.*, 199 F.R.D. 687, 689

1 (M.D.Ala. 2000); and *Dyson Tech. Ltd. v. Maytag Corp.*, 241 F.R.D. 247, 249 (D.Del. 2007). As
2 the court in *National Railway* states, these courts find that the majority view is more consistent
3 with the spirit of full and efficient discovery. The expert report requirement avoids surprise by
4 limiting the witness to the opinions set forth in his or her report. It may also eliminate the need to
5 depose the expert witness or, at least, reduce the time required for deposition.

6 The opposing view is set forth in *Navajo Nation v. Norris*, 189 F.R.D. 610 (E.D.Wash.
7 1999). In that case, the plaintiff disclosed three expert witnesses who were members of the
8 plaintiff's tribal council and would be testifying regarding tribal customs and traditions. The
9 plaintiff argued that these witnesses were not required to prepare written expert reports because
10 their duties as council members did not involve their regularly giving expert testimony in court.
11 The district court agreed. The court held that the the plain language of Rule 26(a)(2)(B) is contrary
12 to the interpretation of the rule adopted in *Day* and similar decisions. *Navajo Nation* stated that
13 "the rule has a specific category of employee experts who must provide a report: those who
14 regularly testify. Given the plain language of this specific category, by implication, those
15 employees who do not regularly testify for the employer but are doing so in a particular case need
16 not provide the report." *Id.* 189 F.R.D. at 612. The court criticized *Day* and *Minn. Mining and*
17 *Mfg. Co. v. Signtech USA, Ltd.*, 177 F.R.D. 459, 460 (D.Minn. 1998) for simply rewriting the rule.
18 The court further stated:

19 Those who drafted FRCP 26(a)(2)(B) could simply have required
20 reports for all employee-experts if that is what they had intended.
21 Neither the *Day* nor the *Minnesota Mining* opinions attempt to
22 explain why they did not. This Court finds that the absence of such
an explanation together with the plain language of the rule make
those cases unpersuasive as contrary to the plain language of Rule
26(a)(2)(B).

23 Although *Navajo Nation* arguably represents the minority view, several relatively recent
24 district court decisions have agreed with its interpretation of Rule 26(a)(2)(B). See *Greenhaw v.*
25 *City of Cedar Rapids, Iowa*, 255 F.R.D. 484, 487 (N.D.Iowa 2009); *The Lamar Company, LLC v.*
26 *City of Marietta*, 538 F.Supp.2d 1366, 1380 (N.D.Ga. 2008); *GSI Group, Inc. v. Sukup Manuf. Co.*,
27 2007 WL 853959 at *2 (C.D.Ill. 2007); *Bowling v. Hasbro, Inc.*, 2006 WL 2345941 (D.R.I. 2006);
28 *Adams v. Gateway*, 2006 WL 644848 at *2 (D.Utah 2006); *United States v. Adam Bros. Farming*,

1 *Inc.*, 2005 WL 5957827 at *5 (C.D.Cal. 2005); and *Kamel v. Whitfield*, 2010 WL 4531379
2 (E.D.Mich. 2010). In stating its support for *Navajo Nation*, the district court in *Greenhaw v. City*
3 *of Cedar Rapids, Iowa*, also states that the court “must apply the rule as it is written, not as it could
4 have been or should have been written.” 255 F.R.D. at 488.

5 Cases adopting the “plain language” interpretation do not attempt to provide a policy
6 rationale for exempting employee witnesses who do not regularly testify as experts from the
7 requirements of Rule 26(a)(2)(B). Nevertheless, there are legitimate reasons for distinguishing
8 between “retained or specially employed” expert witnesses and employee witnesses who do not
9 regularly testify as experts. Retained experts are often engaged in the business of providing expert
10 testimony and charge substantial fees for their services. They may also regularly testify in court or
11 at deposition and may testify on different sides of an issue depending on who retains them.
12 Retained or professional experts are arguably more likely to have published articles or treatises in
13 their fields of expertise than employee witnesses who do not regularly testify as experts. These
14 matters are all relevant for impeachment purposes and Rule 26(a)(2)(B) expedites discovery by
15 requiring that information regarding the witness’s compensation, prior testimony and publications
16 be produced with his or her report. Professional experts are arguably more likely to be familiar
17 with and readily able to comply with the requirements of Rule 26(a)(2)(B) than employee witnesses
18 who do not regularly testify as experts.

19 The 2010 amendment to Rule 26(a)(2) does not explicitly overrule the majority view in *Day*
20 and *Prieto* and there is, as yet, no indication that courts which follow the majority view will now
21 adopt the *Navajo Nation* position. The court in *Meredith v. International Marine Underwriters*,
22 2011 WL 1466436 (D.Md. April 18, 2011), for example, discussed the applicability of Rule
23 26(a)(2)(C), but still held that expert reports were required for employee witnesses whose opinions
24 were formed specifically in anticipation of the litigation or otherwise outside their normal course of
25 duty, notwithstanding that their duties do not regularly involve giving expert testimony. *See also*
26 *Coleman v. American Family Mutual Ins. Co.*, 2011 WL 173674 (N.D.Ind. June 2, 2011) regarding
27 the impact of the 2010 amendment on the requirement, in certain circumstances, that treating
28 physicians comply with Rule 26(a)(2)(B). Cases involving expert testimony by treating physicians

1 are, however, of only limited relevance in deciding the issue in this case because treating physicians
2 usually are not employees of the party proffering their testimony.

3 Allstate's damages witness Aaron Patterson was not involved in evaluating and determining
4 the settlement value of the underlying claims during the time that they were being adjusted or
5 litigated. Rather, he was assigned the task of reviewing the settlements and determining the
6 amount of Allstate's alleged damages for purposes of testifying in this case. There is no dispute
7 that in making his damages calculations, Mr. Patterson has relied on Dr. Little's expert opinions
8 regarding the reasonable chiropractic and medical treatment and charges for each claim. To
9 paraphrase *Prieto*, Mr. Patterson functioned exactly as an expert witness normally does, providing a
10 technical evaluation of evidence he has reviewed in preparation for trial. Under *Day* and *Prieto*,
11 Mr. Patterson would clearly be required to provide an expert report in compliance with Rule
12 26(a)(2)(B). There is no evidence, however, that Mr. Patterson's duties as an Allstate employee
13 regularly involve giving expert testimony—particularly on the type of damages issues involved in
14 this case. Thus, under *Navajo Nation*, Mr. Patterson is not required to provide a written report.

15 Although there is substantial merit in the interpretation of Rule 26(a)(2)(B) set forth in *Day*
16 and *Prieto*, this Court concludes that it should adopt the interpretation set forth in *Navajo Nation*
17 which is more consistent with the actual language of the rule. The Court's decision is also
18 influenced by the 2010 amendment to Rule 26(a)(2). While that amendment did not explicitly
19 reject the *Day-Prieto* interpretation, the fact that the Committee and the Supreme Court chose not
20 to amend Rule 26(a)(2)(B) to adopt that position, but, instead, expanded the disclosures required
21 for expert witnesses who are not required to prepare reports, supports the interpretation set forth in
22 *Navajo Nation*. Accordingly, Mr. Patterson was not required to prepare a written report or provide
23 the other information required by Rule 26(a)(2)(B). Because these requirements do not apply to
24 Mr. Patterson, his expert testimony cannot be barred on this basis.

25 The conclusion that Mr. Patterson was not required to comply with Rule 26(a)(2)(B),
26 however, does not resolve the discovery issues pertaining to his testimony in this case. First,
27 Allstate should have complied with Rule 26(a)(2)(C) when it disclosed Mr. Patterson as its “non-
28 retained expert witness” on February 14, 2011. That subsection required Allstate to disclose (i) the

1 subject matter on which Mr. Patterson is expected to present expert witness testimony and (ii) a
2 summary of the facts and opinions to which Mr. Patterson is expected to testify.³ Allstate's Expert
3 Witness Disclosure complied with the first requirement by stating that Mr. Patterson will testify "as
4 to the calculation and amount of Allstate's damages in this matter." *Motion to Strike* (#322),
5 *Exhibit E*. Although Allstate attached the Damages Spreadsheet to the Expert Witness Disclosure,
6 it did not provide any summary explanation for the calculations set forth in the Spreadsheet. That
7 information was not provided until Allstate served its supplemental responses to interrogatories on
8 May 11, 2011. *Motion* (#322), *Exhibit A*.

9 It appears that Allstate's counsel was probably unaware of Rule 26(a)(2)(C) at the time he
10 served Allstate's Expert Witness Disclosure. Neither party discussed this subsection in their
11 respective briefs or at the hearing on this motion. As discussed above, the parties became
12 embroiled in a dispute over additional deposition time and whether Mr. Patterson is required to
13 comply with Rule 26(a)(2)(B). Although counsel, as well as the Court, are charged with
14 knowledge of amendments to the Federal Rules of Civil Procedure, given the recent enactment of
15 Rule 26(a)(2)(C), the Court finds that the imposition of sanctions on Allstate for failing to comply
16 with this rule is not warranted.⁴

17 The Defendants are clearly entitled to depose Mr. Patterson regarding his expert opinions,
18 the reasons and bases therefore, and the facts or data he considered in forming them. The absence
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20
21 ³ The Advisory Committee Notes state that "[t]his disclosure is considerably less extensive
22 than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail,
23 keeping in mind that these witnesses have not been specially retained and may not be as responsive
24 to counsel as those who have."

25 ⁴ As this Court states in its separate order regarding the Nassiri Defendants' Emergency
26 Motion to Strike Plaintiffs' Complaint (#312), Allstate should have disclosed the method and
27 formula that Mr. Patterson used to calculate the damages in its Fourth Supplement to Plaintiffs'
28 Initial Disclosures Pursuant to FRCP 26(a)(1) served on January 24, 2011 and in the disclosures
served thereafter. The failure to disclose the formula rendered those disclosures misleading.
Absent barring Allstate from introducing evidence on damages, Allstate's failure to timely disclose
the formula also clearly requires that Defendants be able to fully depose Mr. Patterson regarding his
opinions on damages and to obtain rebuttal expert testimony if they so choose.

1 of an expert witness report increases the need for a complete and thorough deposition. Allstate has
2 provided fairly sketchy information regarding the basis for its decision to use a mathematical
3 formula to calculate the settlement value of the underlying claims that settled for less than policy
4 limits. Defendants are entitled to explore the basis for this formula. In addition, Mr. Patterson did
5 not prepare any memoranda or notes regarding his evaluations of the underlying claims that settled
6 for policy limits. The absence of such records also increases Defendants' need to explore these
7 matters in deposition.

8 The Court did not have complete information regarding these matters on April 27, 2011
9 when it granted Defendants only three additional hours to depose Mr. Patterson. The Court
10 therefore rescinds that order. The Noorda and the Nassiri Defendants are entitled to at least one full
11 day of seven hours, jointly, to depose Mr. Patterson. Counsel for the Defendants should confer
12 with each other regarding the division of the deposition time. Counsel for all parties should further
13 confer and attempt to agree either before or during the deposition as to whether more time will
14 reasonably be needed. If the parties are unable to reach agreement, Defendants may move for
15 additional deposition time upon a showing of good cause therefore.

16 Defendants are also entitled to disclose rebuttal expert witnesses in response to Mr.
17 Patterson's expert testimony. Although Rule 26(a)(2)(D) states that the deadline for disclosing
18 rebuttal experts is generally 30 days after the expert witness disclosure deadline, the Court will
19 require Defendants to disclose their rebuttal expert witnesses, if any, within 30 days from the date
20 Mr. Patterson's deposition is completed. The requirements of Rule 26(a)(2)(B) or (C) apply to any
21 rebuttal expert witnesses disclosed by Defendants.

22 CONCLUSION

23 For the reasons set forth above, the Court denies Defendants' Motion to strike and preclude
24 Aaron Patterson from testifying as an expert witness based on Plaintiffs' alleged failure to comply
25 with Rule 26(a)(2)(B). The Court will, however, provide other relief to Defendants to ensure that
26 they have an adequate opportunity to depose Mr. Patterson and to obtain and disclose rebuttal
27 expert witnesses to his testimony on damages. Accordingly,


28 . . .

1 **IT IS HEREBY ORDERED** that the Noorda Defendants' Motion to Strike Aaron
2 Patterson As An Expert Witness and Preclude His Opinions on Damages At Trial (#322), and the
3 Nassiri Defendants' Joinder (#325) therein, are **denied**.

4 **IT IS FURTHER ORDERED** that the Noorda and Nassiri Defendants may take the
5 deposition of Plaintiffs' expert witness Aaron Patterson on or before August 12, 2011. The
6 deposition is initially limited to one full day of seven (7) hours. The parties are encouraged to
7 confer and agree as to whether additional time should be provided to complete the deposition.
8 Absent agreement between the parties, Defendants may move for additional deposition time after
9 they have deposed Mr. Patterson for one full day and can demonstrate good cause for additional
10 time.

11 **IT IS FURTHER ORDERED** that the Noorda and Nassiri Defendants may disclose
12 rebuttal expert witnesses to Mr. Patterson's expert testimony on or before September 12, 2011.
13 Defendants' rebuttal expert witness disclosures shall comply with Rule 26(a)(2)(B) or (C) as
14 applicable. Plaintiffs may depose the Defendants' rebuttal expert witness(es) on or before October
15 12, 2011. These deadlines *may* be extended based on the completion date of Mr. Patterson's
16 deposition.

17 DATED this 20th day of July, 2011.

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20 GEORGE FOLEY, JR.
21 United States Magistrate Judge
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